No. 82-5119

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NELSON BELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT UNIT B

BRIEF FOR PETITIONER

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QUESTION PRESENTED

1. Whether the Federal Bank Robbery Statute 18 U.S.C. §2113(b) should be broadly construed and interpreted so as to include the crime of fraud by false pretenses for which Petitioner has been convicted?

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OPINION BELOW

The en banc opinion of the Court of Appeals (J.A. 15)[1] is officially reported at 678 F.2d 547(1982). The panel opinion (J.A. 6) is officially reported at 649 F.2d 281(1981).

[1]The letters "J.A." followed by a number designate page reference to the Joint Appendix.

JURISDICTION

In a split decision, the Fifth Circuit Court of Appeals reversed the conviction. Timely petitions for rehearing and a suggestion for a hearing en banc were granted on September 4, 1981 (J.A. 14). The petition for a writ of certiorari and leave to proceed *in forma pauperis* were filed July 23, 1982, and were granted on November 29, 1982, (J.A. 28). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Title 18, United States Code

Sec. 2113 Bank robbery and incidental crimes

> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both. . . .

STATEMENT OF THE CASE

Petitioner was indicted pursuant to 18 U.S.C. §2113(b). He allegedly took and carried away, with intent to steal and purloin, certain monies from Dade Federal Savings and Loan Association of Miami. These deposits were insured by Federal Savings and Loan Insurance Corporation. The money belonged to and was in the care, custody, control,

management and possession of Dade Federal (J.A. 3). Petitioner was convicted after a jury trial and sentenced to one year's imprisonment (J.A. 4) based on the following evidence adduced at trial.

On October 13, 1978, Lawrence Rogovin, in Cincinnati, Ohio, wrote a check for $10,000 on his and his wife's Cincinnati bank account. The check was made payable to Lawrence and Elaine Rogovin and bore the following limited endorsement on the reverse side:

> Deposit only to the account of Lawrence and Elaine G. Rogovin at Dade Federal Savings and Loan Account No. 02-1-1-159976-0

Elaine Rogovin mailed the $10,000 check to an agent in Dade County, Florida, on either October 13th or 14th. Said agent was to deposit the check in the Rogovin's account at Dade Federal. (R 24-34).[2] The agent never received this $10,000 check (R 83).

A few days later, petitioner opened a new account at the Alapattah Branch of Dade Federal with the minimum amount required, Fifty Dollars ($50.00) (R 38, 40, 43). He used his own name but a false address, birth date and social security number (R 123-124). Later that same day, petitioner went to another branch of Dade Federal and deposited into his new account a check in the amount of $10,000, giving a second false address. The $10,000 check was the same one mailed by the Rogovins except that their account number on the back of the check had been scratched out and replaced by petitioner's account number. (R 46-48; 126). Dade Federal accepted the check for deposit and placed a 20-day hold on it (R 47-49). Twenty-one days later, petitioner withdrew the

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[2]The letter "R" followed by a number designates page reference to the trial transcript.

total amount of his account, including interest, giving a third false address (R 53-55, 65, 127).

Petitioner's conviction was reversed on appeal by a divided panel which held that the evidence was insufficient to prove that petitioner had a specific intent to steal the $10,000 from the bank when he withdrew the funds (J.A. 10-12). The court of appeals granted a rehearing en banc (J.A. 14). The panel opinion was vacated and petitioner's conviction affirmed based upon the earlier holding of the Fifth Circuit in *Thaggard v. United States,* 354 F.2d 735 (5th Cir. 1965), cert. denied, 383 U.S. 958 (1966) (J.A. 15). In *Thaggard,* the Fifth Circuit, relying upon this Court's decision in *United States v. Turley,* 392 U.S. 407, 417 (1957), held that §2113(b) embraces "all felonious taking . . . with intent to deprive the owner of the rights and benefits of ownership regardless of whether or not the theft constitutes common law larceny." 354 F.2d at 737.

The dissenting judges, persuaded by the analysis of the statute and its legislative history provided in *Le Masters v. United States,* 378 F.2d 262 (9th Cir. 1967), disagreed with the majority's conclusion that theft by false pretenses is within the reach of 18 U.S.C. §2113(b) (J.A. 21-24). The dissent further cited the decision in *United States v. Feroni,* 655 F.2d 707 (6th Cir. 1981) which followed *Le Masters,* and this Court's decision in *Jerome v. United States,* 318 U.S. 101 (1943) as support for a contrary conclusion.

SUMMARY OF ARGUMENT

The Fifth Circuit Court of Appeals broadly interpretated 18 U.S.C. §2113(b) to include the crime of obtaining money from a federal bank by false pretenses. The statute itself is

couched in the words of common-law larceny. The legislative history of this statute, as well as the canons of statutory interpretation, clearly does not support such an extension. Thus, the court of appeal's erroneous holding must be reversed.

POINT I

THE LEGISLATIVE HISTORY DOES NOT SUPPORT THE CONCLUSION THAT 18 U.S.C. §2113(b) ENCOMPASSES MORE THAN COMMON-LAW LARCENY

Petitioner was convicted of having obtained money from a bank by false pretenses in violation of 18 U.S.C. §2113(b).[3] Petitioner contended that the statute only covered common-law larceny, defined as a felonious or trespassory "taking or carrying away" of the property of another[4] and not obtaining money by false pretenses. As pointed out by the Ninth Circuit in *Le Masters v. United States,* 378 F.2d 262, 264 (1967), the quoted language actually employs terms that are similar

[3]18 U.S.C. §2113(b) provides in pertinent part:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both. . . .

[4]See *e.g.* La Fave & Scott, *Criminal Law* at 622, 631-3.

> Larceny at common-law may be defined as the (1) the trespassory (2) taking and (3) carrying away of the (4) personal property (5) of another (6) with intent to steal it.

In the brief for the United States, in *Jerome,* the government described what is now §2113(b) as containing a definition of the offense of "larceny" that embodies the "common-law concepts of . . . a taking and carrying away with intent to steal." No. 325, 1942 Term, at 27.

to those used in the traditional formulation of common-law larceny. A distinction has been cited at common-law between the crimes of larceny (trespassory or non-consensual acquisition of the property from another) and false pretenses (consensual acquisition of property and title thereto procured by fraud or fraudulent representations).[5]

The Appellate Court based its decision upon *Thaggard v. United States,* 354 F.2d 735 (5th Cir. 1965), cert. denied 383 U.S. 958(1966)[6] which broadly construed the statute's ambiguous term "steal" as to embrace "all felonious takings . . . with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constituted common-law larceny." *Id.,* at 737 quoting *United States v. Turley,* 352 U.S. 407 (1957). Petitioner contends that this interpretation is erroneous.

In *Turley,* this Court interpreted 18 U.S.C. §2312, entitled the National Motor Vehicle Act, more commonly known as the Dyer Act, which provides criminal sanctions for "whoever transports interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen . . ."[7] The Court addressed the issue of whether the meaning of the

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[5]See La Fave & Scott, *supra,* 618, 622, 655 (1972); Miller, *Criminal Law* 340-1, 348-82, 390 (1934).

[6]The court noted at the outset that the Federal Statute made no mention of "larceny;" rather it was couched in terms of "steal and purloin." Though the court was aware of the Fourth Circuit's statement that paragraph (b) of the bank robbery act reached only the offense of common-law larceny, *United States v. Rogers,* 289 F.2d 433, 437 (4th Cir. 1961), the Fifth Circuit nevertheless accepted this Court's decision in *Turley* as ruling. *Supra,* at 736.

[7]The original Act, sponsored by Representative Dyer became law in 1919, 41 Stat. 324. It was amended in 1945 to include aircraft, 59 Stat. 536, and was re-enacted in 1948 as part of the Criminal Code, 62 Stat. 806.

word "stolen" was limited to common-law larceny or other felonious takings as well. *Supra,* at 408. Having determined that the term "stolen" or "stealing" has no accepted common-law meaning,[8] the Court proceeded to examine the statute's legislative history.

Though most of the states had local theft statutes which included not only common-law larceny but false pretenses, larceny by trick, and other types of wrongful taking, the advent of the automobile created necessity for federal action. A committee report entitled "Theft of Automobiles"[9] pointed to the increasing number of automobile thefts, the resulting financial losses and the increasing cost of automobile theft insurance as well as asserting the inadequacy of state laws in coping with the problem. The report, as cited in *Turley, supra,* at 414 n. 13, began and ended as follows:

> "The Congress of the United States can scarcely enact any law at this session that is more needed than the bill herein recommended, and that has for its purpose the providing of severe punishment of those guilty of the stealing of automobiles in interstate or foreign commerce. . . . State laws upon the subject have been inadequate to meet the evil. Thieves steal automobiles and take them from one State to another and oft-times have associates in this crime who receive and sell the stolen machines. . . .
>
> "The purpose of the proposed law is to suppress crime in interstate commerce. Automobiles admittedly are tangible property, capable of being transmitted in interstate commerce. The larceny of automobiles is made a crime under the laws of all the States in the Union. No

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[8] *Supra,* at 411-2. This Court stated that "where a federal criminal statute uses a common-law term of established meaning without defining it, the general practice is to give the term its common-law meaning."

[9] H.R. Rep. No. 312, 66th Cong., 1st Sess.

> good reason exists why Congress, invested with the power to regulate commerce among the several States, should not provide that such commerce should not be polluted by the carrying of stolen property from one State to another. Congress is the only power competent to legislate upon this evil, and the purpose of this bill is to crush it, with the penalties attached." *Id.*, at 1, 4. See also, 58 Cong. Rec. 5470-5478, 6433-6435.

This Court concluded that "the Act requires an interpretation of 'stolen' which does not limit it to situations which at common law would be considered larceny. The refinements of that crime are not related to the primary congressional purpose of eliminating the interstate traffic in unlawfully obtained motor vehicles." *Supra,* at 417.

In *Thaggard,* the Fifth Circuit interpreted 18 U.S.C. §2113(b), the Federal Bank Robbery Act. The issue here, as in *Turley,* was whether the word "steal" encompassed more than common-law larceny. The court broadly construed the statute based upon *Turley.* In so doing, the Fifth Circuit rejected the Fourth Circuit's acceptance in *United States v. Rogers,* 289 F.2d 433, 437 (4th Cir. 1961), of the premise that §2113(b) reached only common-law larceny.[10] Having similarly relied on *Turley,* the Second Circuit, *United States v. Fistel,* 460 F.2d 157, 162-3 (2nd Cir. 1972), Seventh Circuit, *United States v. Guiffre,* 576 F.2d 126, 127-8 (7th Cir. 1978), cert. denied, 439 U.S. 833(1978), and the Eighth Circuit, *United States v. Johnson,* 575 F.2d 678, 679-80 (8th Cir. 1978) have held that a narrow construction of

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[10]The contrary language in *Thaggard* was also dictum as the case had been tried under a theory that required the jury to find the defendant guilty of larceny not false pretenses. *Supra,* at 737-8.

§2113(b) was not warranted.[11] None of the above mentioned circuits examines the legislative history of that enactment. Each of these decisions is nothing more than a "mechanical application of *Turley,*" providing no discussion as to why a broad interpretation of §2113(b) is appropriate. *United States v. Feroni,* 655 F.2d 707, 710 (6th Cir. 1981). The court further stated:

> The Circuits which have endorsed a broad construction of §2113(b) have miscalculated the effect of *Turley* on this question. *Turley* does not establish that the word "stolen" in any federal criminal statute includes all felonious takings. The Court simply found that the word is unencumbered by common law meanings. The opinion explicitly states that the meaning of the word should be consistent with the context in which it appears and further that it is appropriate to consider the purpose of the statute and to gain what light is available from the legislative history. . . . It is clear that the Court contemplated that "stolen" could have different meanings in different statutes. *Supra,* at 710.

This Court summarized the legislative history of 18 U.S.C. §2113 in *Jerome v. United States,* 318 U.S. 101, 102-4 (1943) as follows:

> Prior to 1934 banks organized or operating under federal law were protected against embezzlement and like offense by R.S. 5209, 40 Stat. 972, 12 U.S.C. §592, 12 U.S. C. A., §592. But such crimes as robbery, burglary

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[11]In *Fistel,* the court was asked to interpret the word "steal" as used in the National Stolen Property Act.

In *Guiffre,* the conduct in issue constituted common-law larceny, therefore the question whether §2113(b) applied to conduct other than larceny was not directly raised. Br. in Opp., NO71-1778, 1978 Term, at 204.

In *Johnson,* the court expressed doubt that §2113(b) is limited to common-law larceny but found it unnecessary to resolve the issue.

and larceny directed against such banks were punishable only under state law. By 1934 great concern had been expressed over interstate operations by gangsters againsts banks—activities with which local authorities were frequently unable to cope. H.Rep. No. 1461, 73d Cong., 2d Sess., p. 2. The Attorney General in response to that concern recommended legislation embracing certain new federal offenses. S. 2841, 73d Cong. 2d Sess. And see 78 Cong. Rec. 5738. Sec. 3 of that bill made it a federal crime to break into or attempt to break into such banks with intent to commit "any offense defined by this Act, or any felony under any law of the United States or under any law of the State, District, Territory, or possession" in which the bank was located. Sec. 2 made it an offense to take or attempt to take money or property belonging to or in the possession of such a bank without its consent or with its consent obtained "by any trick, artifice, fraud, or false or fraudulent representation." This bill was reported favorably by the Senate Judiciary Committee (S. Rep. No. 537, 73d Cong., 2d Sess.) and passed the Senate. 78 Cong. Rec. 5738. The House Judiciary Committee, however, struck out §2, dealing with larceny, and §3, dealing with burglary. H. Rep. No. 1461, *supra*, p. 1. And the bill was finally enacted without them. But it retained the robbery provision now contained in the first clause of §2(a) of the Bank Robbery Act.

In 1937 the Attorney General recommended the enlargement of the Bank Robbery Act "to include larceny and burglary of the banks" protected by it. H. Rep. No. 732, 75th Cong., 1st Sess., p. 1. The fact that the 1934 statute was limited to robbery was said to have produced "some incongruous results"—a "striking instance" of which was the case of a man who stole a large sum from a bank but who was not guilty of robbery because he did not display force or violence and did not put any one in fear. *Id.*, pp. 1-2. The bill as introduced (H.R. 5900, 75th Cong., 1st Sess., 81 Cong. Rec. 2731) added to §2(a)

two new clauses—one defining larceny and the other making it a federal offense to enter or attempt to enter any bank with intent to commit therein "any larceny or other depredation." For reasons not disclosed in the legislative history, the House Judiciary Committee substituted "any felony or larceny" for "any larceny or other depredation." H. Rep. No. 732, *supra*, p. 2. With that change and with an amendment to the larceny clause distinguishing between grand and petit larceny (81 Cong. Rec. 5376-5377), §2(a) was enacted in its present form.

In analyzing the legislative history of 18 U.S.C. §2113(b) the Ninth Circuit in *Le Masters, supra,* at 267-8 not only concluded that a narrow construction was appropriate but also specifically held the crime of false pretenses beyond the statute's reach. In delving into Congressional intent, the court stated:

The 1937 enactment of 18 U.S. Code §2113(b) had a background and legislative history wholly different from those of the 1919 Stolen Motor Vehicle Act. We are aware of no background of evil at which Congress was pointing the statute except the evil of interstate operation of gangster bank robbers. As we have seen, the Senate in 1934 passed a bill clearly and expressly creating several federal crimes against banks, including the crime of obtaining by false pretense. The House, and the Congress, rejected the bill, enacting only the robbery provisions. In 1937, without any further discussion of evil to be cured, Congress enacted §2113 clearly covering robbery and burglary, and including §2113(b), the provision containing the ambiguous words "steal" and "purloin." In construing the words we are obliged by the Turley case to give them a "meaning consistent with the context in which (they) appear." We think that the context, in light of legislative history, requires that they be construed as not covering the obtaining of money by

> false pretenses. The words are used in conjunction with the words "takes and carries away," and these are the classic words used to define larceny. . . .
>
> In the bank situation we see no reason, urgent or otherwise, why Congress in 1937 should have wanted to enter the field of obtaining by false pretenses, duplicating state law which was adequate and effectively enforced, and the duplication of which would bring innumerable cases, most of them small, within the jurisdiction of federal prosecutors and courts. Congress was as aware in 1937 as it was in 1934, when it rejected the unambiguous provision making obtaining by false pretense from a bank of federal crime, that such an extension of federal law would serve no purpose except to confuse and dilute state responsibility for local crimes which were being adequately dealt with by state law. None of the reasons which persuaded the circuits and finally the Supreme Court to interpret broadly the word stolen in the motor vehicle act were present in 1937, when Congress wrote §2113, or are present today.

Having similarly relied extensively on the statute's legislative history, the Third Circuit, *United States v. Pinto,* 646 F.2d 833, cert. denied, 102 S.Ct. 94 (1981),[12] the Fourth Circuit, *United States v. Rogers,* 289 F.2d 433 (4th Cir. 1961), and the Sixth Circuit, *United States v. Feroni,* 655 F.2d 707 (6th Cir. 1981) have adopted a narrower construction of §2113(b). Although the actual holding in *Jerome* concerns the scope of the bank burglary provision in §2113(a), this Court took a view of the Bank Robbery Act and its legislative

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[12]In *United States v. Simmons,* 679 F.2d 1042, 1049 (3rd Cir. 1982) the court stated that the holding in *Pinto* was explicitly limited to the facts before the court at that time and that the language in that opinion which might be susceptible of a restrictive construction of 18 U.S.C. §2113(b) was at most dictum.

history that is consistent with a narrow interpretation of §2113(b).

In *Rogers,* the court stated:

> We accept the defendant's premise that paragraph (b) of the bank robbery act reaches only the offense of larceny as that crime has been defined by the common-law. It does not encompass the crimes of embezzlement from a bank, reached by another statute, or obtaining goods by false pretense. That this is so is indicated by the use of the words, "(w)hoever takes and carries away with intent to steal and purloin . . . ," borrowed from the Act of April 30, 1790, which had been construed as a larceny statute. It is further indicated by the title of the Act and its legislative history, *supra,* at 437.

Further evidence that 18 U.S.C. §2113 was never designed to be an all encompassing theft offense can be gleamed from the enactment of 18 U.S.C. §656 (dealing with embezzlement) and 18 U.S.C. §1025 (dealing with obtaining property by false pretenses upon any waters or vessels). The two crimes covered by these statutes have been traditionally distinguished from common-law larceny.

The government, pointing out that §1025 was enacted in response to the recommendation of the Attorney General, states the following:

> He stated in a letter to Congress that existing federal statutes applicable in that special federal jurisdiction—including, he stated, the statute prohibiting "larceny" 18 U.S.C. (1940 ed.) 466 (the present 18 U.S.C. 661)—did not reach "card sharping" offenses on the high seas. Thus, he explained, he was recommending the enactment of legislation to prohibit obtaining money by false pretenses on the high seas, which would include the activity of card sharps within its scope. See S. Rep. No. 446, 76th Cong., 1st Sess. 1 (1939).

The general federal larceny statute that was among the criminal statutes cited by the Attorney General as not covering the conduct in question was derived from a 1790 statute that was and is written in terms identical to Section 2113(b), applying to whoever "takes and carries away (property), with intent to steal or purloin." The enactment of Section 1025 in 1939 therefore might suggest that neither Congress nor the Attorney General in 1937 understood the identical language in Section 2113(b) (or the reference to that language as "larceny") to include false pretenses.[13]

POINT II

CANONS OF STATUTORY INTERPRETATION DO NOT SUPPORT THE CONCLUSION THAT 18 U.S.C. §2113(b) ENCOMPASSES MORE THAN COMMON-LAW LARCENY

Certain general principles of interpretation of criminal statutes have gained wide acceptance. The following clearly support Petitioner's contention that the court of appeals erred in its interpretation of §2113(b). Penal statutes have been held to be strictly construed, with ambiguities resolved in favor of leniency, *United States v. Enmons,* 410 U.S. 396, 411 (1973); *United States v. Quinn,* 514 F.2d 1250, 1254 (5th Cir. 1975). As to this principle the Fifth Circuit stated in *United States v. Sayklay,* 542 F.2d 942, 944 (5th Cir. 1976):

> The defendant's wrongful actions render her an undeserving candidate for application of the principle,

[13]Memorandum for the United States, 1982 Term, at 17-18.

> but doubtless most who require its assistance have been and will be undeserving. More is at stake here than convicting a wrongdoer of *something;* fidelity to Congress' clear purpose and refusal to convict anyone of a crime of which he has not been—and cannot be, on the facts—proved guilty.

This Court in *Turley, supra,* at 411-3 stated "where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning. . . . Freed from a common-law meaning, we should give . . . the meaning consistent with the context in which it appears."

In *Williams v. United States,* 50 U.S.L.W. 4949, 4951 (1982), this Court stated "and, when interpreting a criminal statute that does not explicitly reach the conduct in question, we are reluctant to base an expansive reading on inferences drawn from subjective and variable 'understandings'." This Court further stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. *Id.,* at 4952.

This Court has stated in *Jerome, supra,* at 104-5 (1943):

> Since there is no common law offense against the United States . . . , the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress. We should be mindful of that tradition in determining the scope of federal statutes defining offenses which duplicate or build upon state law. In that connection it should be noted that the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained. . . . That consideration gives additional weight to the view that

> where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute.

This Court has also stated that federal criminal jurisdiction cannot be extended by presumption; rather it could be done only through a clear expression in the statute.

Using the above canons of statutory interpretation, §2113(b) should not be so broadly construed as to encompass more than common-law larceny. Since the ambiguous term "steal" has no common-law meaning, the context in which it was used must be examined. The statute's legislative history clearly indicates that Congress did not intend false pretenses to be included. The court in *Le Master* stated that "in the bank situation we see no reason, urgent or otherwise, why Congress in 1937 should have wanted to enter the field of obtaining by false pretenses duplicating state law which was adequate and effectively enforced. . . ." *supra,* at 268. When Congress wanted a statute to reach the criminal act of false pretenses, it has often used the term "obtain," rather than "take and carry away."[14] Congress specifically covered other theft crimes in other sections of Title 18. As such, the court of appeals erroneously interpretated the meaning of §2113(b).

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[14]See, *e.g.* 18 U.S.C. §1025; La Fave & Scott, *supra,* at 655; Miller, *supra,* at 382.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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